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No. 96-792

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LYNNE KALINA,

PETITIONER,

v.

RODNEY FLETCHER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
IN THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE*,
NATIONAL DISTRICT ATTORNEYS'
ASSOCIATION AND CALIFORNIA DISTRICT
ATTORNEYS ASSOCIATION IN SUPPORT OF
THE PETITIONER

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14 pb

QUESTION PRESENTED

Whether a prosecutor is entitled to absolute immunity for conduct in the function of obtaining an arrest warrant?

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LYNNE KALINA,
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BRIEF OF *AMICUS CURIAE*
NATIONAL DISTRICT ATTORNEYS ASSOCIATION
AND
CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION
IN SUPPORT OF THE PETITIONER

STATEMENT OF THE INTEREST*

The National District Attorneys Association is an organization comprised of District Attorneys, Prosecuting Attorneys, deputy and assistant prosecutors from all fifty states who practice in both the criminal and civil fields. The California District Attorneys Association consists of the District Attorneys of the State of California, city attorneys, city prosecutors, the California Attorney General, and assistant, local, and state prosecutors.

Upon review of the instant matter, these associations have concluded that the outcome of this case will have a profound impact upon the prosecutors' role in the arrest warrant process.

* Counsel for both petitioner and respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

SUMMARY OF ARGUMENT

This Court has adopted a functional analysis in determining prosecutorial absolute immunity. A prosecutor will be absolutely immune for prosecutorial functions "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman* 424 U.S. 409, 430, (1976). The focus is therefore on the prosecutorial function, not prosecutorial acts or conduct, in determining the scope of immunity.

A prosecutor is absolutely immune when functioning as an advocate in respect to judicial proceedings. *Imbler v. Pachtman*, *supra*, 424 U.S. at 430; *Malley v. Briggs* 475 U.S. 335, 342 (1986); *Burns v. Reed* 500 U.S. 478, 486 (1991); *Buckley v. Fitzsimmons* 509 U.S. 259, 269-270, (1993). This function, while judicially related, is not limited to the courtroom setting. *Burns v. Reed*, *supra*, 500 U.S. at 486; *Buckley v. Fitzsimmons*, *supra*, 509 U.S. 269-270.

A prosecutor's function in preparing an affidavit for an arrest warrant, and advocating the warrant's issuance, is intimately related to the judicial phase of the criminal process and therefore is to be given absolute immunity.

It is critical to the interests of both society and the accused, by prosecutors independently reviewing, preparing and advocating for the issuance of arrest warrants, that prosecutors be granted absolute immunity while functioning in the arrest warrant process. The prosecutor, charged with seeking justice, *Berger v. United States* 295 U.S. 78, 88 (1935), protects both society and the accused by review, preparation, and advocacy of application for warrants of arrest.

ARGUMENT

I

PROSECUTORIAL CONDUCT IN REVIEWING REQUESTS FOR ARREST WARRANTS, PREPARING AFFIDAVITS IN RESPECT THERETO, AND ADVOCATING ISSUANCE OF ARREST WARRANTS IS A FUNCTION INTIMATELY ASSOCIATED WITH THE JUDICIAL PHASE OF THE CRIMINAL PROCESS WHICH MUST BE ACCORDED ABSOLUTE IMMUNITY

Twenty years ago, this Court addressed the issue of prosecutorial immunity. *Imbler v. Pachtman*, *supra*, 424 U.S. at 430. This Court adopted a functional test: A prosecutor will be absolutely immune for prosecutorial functions "intimately associated with the judicial phase of the criminal process." *Ibid*.

This Court, in 42 U.S.C. §1983 suits, rejected the lesser protection of qualified immunity which "would undermine performance of [the prosecutor's] duties no less than would the threat of common-law suits for malicious prosecution." *Imbler v. Pachtman*, *supra*, 424 U.S. at 424.

The *Imbler* opinion concluded that a prosecutor will be accorded absolute immunity when initiating a prosecution and presenting the State's case. *Id.* at 431.

In 1986, this Court decided *Malley v. Briggs*, *supra*, 475 U.S. 335.¹ At issue, was whether a police officer is to be

¹ The Ninth Circuit Court of Appeals decision in *Fletcher v. Kalina* 93 F.3d 653, 654, (9th Cir. 1996), bases its holding on *Malley*. *Id.* at 654.

The Eighth Circuit Court of Appeals decision of *Kohl v. Casson* 5 F.3d 1141 (8th Cir. 1993), states:

granted absolute immunity for presenting to a judge felony

We conclude from *Burns* and *Malley* that a prosecutor is absolutely immune for appearing before a judicial officer to present evidence in support of an application for an arrest warrant, insofar as he acts as the state's advocate in presenting evidence and arguing the law.

Id. at 1146.

However, relying on *Malley*, the *Kohl* opinion also states that a prosecutor is entitled to only qualified immunity when vouching for the truth of the affidavits presented to a judicial officer. *Ibid.* It is submitted the analysis of *Malley* by the courts in *Fletcher* and *Kohl* is misdirected because the focus must be not on act but function.

The recent opinion of the Tenth Circuit Court of Appeals in *Roberts v. Kling* 104 F.3d 316 (10th Cir. 1997), provides for absolute prosecutorial immunity for a District Attorney's office investigator who prepared a "Statement of Facts" and sought an arrest warrant following a determination of probable cause within the District Attorney's office. *Id.* at 322. That opinion focuses not on acts but function:

We are mindful of case law reasoning that different actors performing the same acts should receive the same level of immunity. See, e.g. *Fletcher*, 93 F.3d at 655-56. Nonetheless, we think that the proper focus is on the function an act serves, not the act itself. Further, we think Supreme Court authority supports this analysis.

Id. at 321.

The various jurisdictions throughout the United States have differing procedural requirements in application and advocacy for arrest warrants. Therefore, depending upon the jurisdiction, prosecutorial acts and conduct in the arrest warrant process will differ. However it is submitted that the prosecutorial function in all jurisdictions will be the same.

complaints and unsigned warrants for arrest. *Id.* at 339. The police officer urged this Court to compare his conduct to that of the prosecutor who initiates an indictment. *Id.* at 341-342. This court declined. It used a functional analysis:

Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.[fn. omitted]

Id. at 343.²

² Relying on *Imbler*, the *Malley* opinion reiterates another distinction made between prosecutor and police: A prosecutor is subject to professional discipline:

The organized bar's development and enforcement of professional standards for prosecutors also lessen the danger that absolute immunity will become a shield for prosecutorial misconduct. As we observed in *Imbler*, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." 424 US at 429, 96 S. Ct. 984 (footnote omitted). The absence of a comparably well-developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity for the officer.

Malley v. Briggs, *supra*, 475 U.S. at 343, fn. 5.

In addition to professional discipline, a prosecutor involved in a judicial proceeding based on the application for an arrest warrant is subject to judicial sanction, administrative

In 1991, this Court decided *Burns v. Reed*, *supra*, 500 U.S. 478, and held that prosecutors are absolutely immune for their conduct in their appearance and presentation of evidence at a probable cause hearing advocating the issuance of a search warrant. *Id.* at 491-92. The analysis is again functional:

[S]ince the issuance of a search warrant is unquestionably a judicial act, [Citation omitted], appearing at a probable - cause hearing is "intimately associated with the judicial phase of the criminal process." [Citation omitted]. It is also connected with the initiation and conduct of a prosecution, particularly where the hearing occurs after arrest, as was the case here. *Id.* at 492.

The issuance of a warrant for arrest is most often more closely connected with the initiation and conduct of a prosecution than the issuance of a search warrant.³

Whether a prosecutor presents evidence through live witnesses at an application for search warrant, as occurred in

discipline, and, in the case of chief prosecutors, accountability to the electorate.

Absolute immunity should be the standard "not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." *Malley*, *supra*, 475 U.S. at 342.

³ The *Burns* opinion states that in the probable cause hearing "[t]he safeguards built into the judicial system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Burns v. Reed*, *supra*, 500 U.S. at 492; See also *Joseph v. Patterson* 795 F.2d 549, 556 (6th Cir. 1986).

It is submitted the same rationale of judicial safeguards applies with respect to the application for an arrest warrant.

Burns, or advocates to a court the issuance of an arrest warrant through affidavits summarizing evidence as occurred in the case at bar, is a distinction without difference. Both involve the advocacy function, are intimately associated with the judicial process, and are subject to safeguards built into the judicial system.⁴

In 1993, this court decided *Buckley v. Fitzsimmons*, *supra*, 500 U.S. 259, and refused to limit absolute immunity for prosecutors to the courtroom setting:

This extreme position [of Petitioner] is plainly foreclosed by our opinion in *Imbler* itself. We expressly stated that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom" and are nonetheless entitled to absolute immunity.

Id. at 272.

Thus, over the past twenty years, this Court has reaffirmed that it is the function, not the acts or conduct of the prosecutor, which governs the application of absolute immunity. Prosecutorial participation in judicial proceedings is

⁴ Respondent would draw a distinction between preparing and signing the Information and preparing the affidavit urging issuance of the arrest warrant, which Respondent characterizes as "acting as a complaining witness on the declaration to establish probable cause." Respondent's Brief in Opposition, pp.7-8. In attempting to draw this distinction, Respondent confuses the prosecutor's acts with the function the acts serve. In both instances, the prosecutor's function is that of an advocate. The prosecutor is not a witness. The prosecutorial function in both seeking an indictment and in seeking an arrest warrant is intimately associated with the judicial process. In both instances the prosecutor is entitled to absolute immunity.

functionally entitled to absolute immunity, *Imbler v. Pachtman*, *supra*, 424 U.S. at 430; *Malley v. Briggs*, *supra*, 475 U.S. at 342; *Burns v. Reed*, *supra*, 500 U.S. at 478, 486; *Buckley v. Fitzsimmons*, *supra*, 509 U.S. at 269-270, and is not limited to the courtroom setting. *Burns v. Reed*, *supra*, 500 U.S. at 486; *Buckley v. Fitzsimmons*, *supra*, 509 U.S. at 269-270. It is submitted that the prosecutorial function in preparation of affidavits in support of an arrest warrant, application, and advocacy of the warrant's issuance fit within parameters established by this Court which grant absolute immunity.⁵

⁵ Petitioner's conduct in preparing and presenting the arrest warrant illustrates why this function is entitled to absolute immunity. Petitioner prepared and filed an application for arrest warrant which advocated that a judicial order of arrest issue. That "MOTION AND ORDER DETERMINING THE EXISTENCE OF PROBABLE CAUSE, DIRECTING ISSUANCE OF WARRANT AND FIXING BAIL" states:

The plaintiff, having informed the court that it is filing herein an Information charging the defendant with the crime of Burglary in the Second Degree now moves the court for an order determining the existence of probable cause and directing the issuance of a warrant for the arrest of the defendant....

Petition for A Writ of Certiorari, Appendix, Exhibit B, pg. 13a.

By and through this document, Petitioner advocated to the court the issuance of an arrest warrant. Petitioner's functional conduct was "intimately associated with the judicial phase of the criminal process", *Imbler v. Pachtman*, *supra*, 424 U.S. at 430. It is entitled to absolute immunity.

II

IT IS CRITICAL TO THE INTERESTS OF BOTH SOCIETY AND THE ACCUSED THAT PROSECUTORS BE ACCORDED ABSOLUTE IMMUNITY WHEN PARTICIPATING IN THE ARREST WARRANT PROCESS

It is in the interest of both society and the accused that prosecutors have independence of judgement, unhampered by threat of lawsuit, in the review, preparation, and advocacy of issuance of arrest warrants. The prosecutorial function in this process is to evaluate, reject, draft, and advocate the legal and factual sufficiency of applications to the judiciary for warrants of arrest. The independent prosecutorial review, preparation, and decision whether or not to advocate the issuance of an arrest warrant protects as much the person subject to arrest as it does the interests of society. That function must be protected by absolute, not qualified, immunity:

It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards for qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could endanger colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials. [Citation omitted.]

Imbler v. Pachtman, *supra*, 424 U.S. at 425-426.

Today, there are about 2,350 state and local prosecutors' offices in the United States. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, *Prosecutors in State Courts*, 1994, at 1 (October,

1996). Some are in large metropolitan areas with full time prosecutors, but about a third of the prosecution offices throughout the country have only a part time prosecutor. *Ibid.* The pressures and demands on prosecutors have not diminished over the years since this Court addressed the issue of prosecutorial immunity in *Imbler v. Pachtman*. It is critical that absolute immunity be insured in prosecutorial participation in application for warrants of arrest.

CONCLUSION

For the reasons stated above, amicus urges this Court to grant prosecutors absolute immunity for their acts and conduct in obtaining arrest warrants, and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted
on behalf of the
National District Attorneys Association
and the California District Attorneys Association

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By

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Attorneys for *Amicus Curiae*

DECLARATION OF SERVICE BY MAIL

The undersigned declares under the penalty of perjury that the following is true and correct:

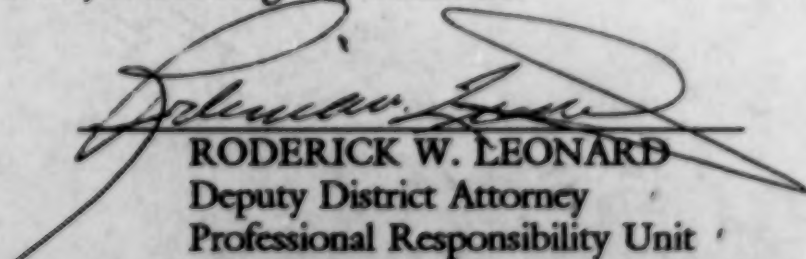
I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County with offices at 849 S. Broadway, 11th Floor, Los Angeles, California 90014-3268. On the date of execution hereof I served the attached document by depositing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed to the following:

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Executed on April 22, 1997, at Los Angeles, California.


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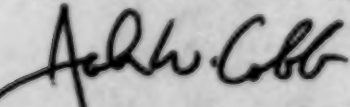
Re: Kalina v. Fletcher, U.S. S.Ct. No 96-792

Dear Mr. Leonard:

The Petitioner in this case, Lynne Kalina, hereby consents to the filing by the National District Attorney's Association and California District Attorney's Association, together, of an amicus brief in the above-referenced case before the Supreme Court of the United States.

Sincerely,

For NORM MALENG, King County Prosecuting Attorney



John W. Cobb
Senior Deputy Prosecuting Attorney

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Roderick W. Leonard
Los Angeles County District Attorney's Office
849 South Broadway, 11th Floor
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Re: Kalina v. Fletcher, U.S. S.Ct. No. 96-792

Dear Mr. Leonard:

The Respondent in this case, Rodney Fletcher, hereby consents to the filing by the National District Attorney's Association and California District Attorney's Association, together, of an amicus brief in the above-entitled case before the Supreme Court of the United States.

Sincerely,

MacDONALD, HOAGUE & BAYLESS



Timothy K. Ford

TKF/lt

cc: John Cobb
Brady Johnson
Rodney Fletcher